No. 1584.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The California Development Company, (a corporation),
Appellant,
vs.
The New Liverpool Salt Company, (a corporation),
Appellee.

PETITION FOR REHEARING.

EUGENE S. IVES,
Counsel for Appellant.

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The appellant respectfully petitions for a rehearing, and offers the following argument in support of its petition:

We will not ask the court to review its conclusions that the destruction of the property of appellee was caused by the negligence of appellant, that there was no failure of parties defendant, and, that the court, if it at any time had equitable jurisdiction, had power to retain jurisdiction and award damages.

We will, however, ask that further consideration be given to the following proposition deemed by us to be sound in law.

UNDER THE ALLEGATION IN THE COMPLAINT THAT "UNLESS THE DEFENDANT BE REQUIRED TO CONSTRUCT HEAD GATES FOR THE CONTROLLING AND REGULATING OF AMOUNT OF WATER FLOWING INTO ITS CANALS THE SAID WATER WILL CONTINUE TO FLOW AND DESTROY AND RUIN THE PROPERTY AND BUSINESS OF COMPLAINANT" AND THE EVIDENCE THAT SUCH DESTRUCTION OF COMPLAINANT'S PROPERTY COULD ONLY HAVE BEEN PREVENTED BY CLOSING THE INTAKES IN MEXICO THE COURT HAD NO JURISDICTION TO GRANT EQUITABLE RELIEF.

Our reasons for asking the court to review its decision upon the issues involved in this proposition are:

First. While a court may restrain a defendant over whose person it has jurisdiction from doing an act in a foreign jurisdiction, it can never by mandatory injunction compel him to do a positive act in a foreign jurisdiction.

Second. While a court of equity, having jurisdiction over the person of a defendant, may adjudicate as to the respective rights of the complainant and defendant to water appurtenant to complainant's lands within the jurisdiction of the court, and may restrain the defendant from asserting rights to such water inconsistent with the rights of the complainant, it cannot by mandatory decree compel the defendant to do any positive act of either construction or destruction upon property beyond the jurisdiction of the court, even if such act be

essential to complainant's enjoyment of his right to the water so adjudicated.

Third. A court of equity is without power to compel a defendant to do anything which is not capable of being physically done within the territorial jurisdiction of the court.

Fourth. Without respect to the question of extra territorial jurisdiction, the facts in this case were not such as to call for equitable relief.

At the time of the commencement of the action, the properties of the complainant were almost if not totally destroyed by the consequential results of defendant's negligence.

The defendant at such time was not asserting any right to repeat the wrongful act which caused the damage, was not threatening to repeat it and was endeavoring to close the intake and in fact to do all which the complainant by injunction sought to compel it to do.

This is the undisputed proof.

Therefore there was no necessity or ground for the intervention of a court of equity.

STATEMENT.

In the very important case of Miller & Lux v. Rickey, 127 Federal, page 573, Judge Hawley, apprehensive lest the purport of his decision be misconceived and guarding against any possible misunderstanding or misapplication of the principle underlying it, at the very threshold of his opinion stated:

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involved by the particular facts of this case as drawn from the pleadings, and to the grounds upon which the decision will be based. It will, of course, be conceded at the outset that this court has no jurisdiction over lands and real estate situate without this district. *It cannot abate nuisances outside of the district.* It cannot reach property in *rem* wholly situate in other states. It cannot, by any decree which it may make in this suit directly reach the dams, reservoirs or ditches belonging to the defendant located entirely within the state of California. What is the nature and character of this suit, as shown by the bill of complaint and plea of the defendant?"

Let us therefore give careful consideration to the nature and character of this suit as shown by the bill and the evidence, assuming the facts to be in all respects as alleged and claimed by complainant.

The defendant claimed no rights in any way inconsistent with complainant's undisturbed enjoyment and possession of its property. The complainant did not claim and does not claim that the proper diversion of the waters of the Colorado river by the defendant and the irrigation of the lands in Imperial Valley were unlawful acts or in any respect tended to injure complainant or its properties.

Complainant's charge is that the defendant unnecessarily, and in order to save expense, cut intakes into the banks of the Colorado river in such negligent fashion that the property of complainant was *endangered*—not injured but endangered. It is not claimed that the necessary effect of the cutting of such intakes

was injury to complainant's property, as is the case where the construction of a dam is found necessarily to cause the flooding of another's property. (In such case the construction of the dam is a nuisance *per se* as was held in Leonard v. Castle, 78 Cal. p. 454, cited in the opinion.) The intakes were carelessly cut and with the expectation and reasonable expectation that before harm could result from them they could and would be closed. They were 60 feet wide and it is not claimed that a 60 foot wide cut would convey sufficient water to damage complainant's property. Huge floods of the Colorado river swept through this intake and enlarged it.

It is not suggested that the defendant either intended or desired this enlargement. While responsible for it as having been caused by the negligent way in which the 60 foot intake was cut, such enlargement as a matter of fact occurred in spite of the purpose and effort of defendant to check it and to close the intake.

At the time of the commencement of suit, the property of complainant was inundated and the total destruction of its buildings and machinery was either actually consummated or inevitable.

The defendant had in the meantime been making active efforts to close the break, which efforts at the very time of the commencement of the suit were being continued and renewed.

Supplement the above synopsis of the facts with the additional ones that the break to be closed was in Mexico and that its closing involved engineering plans and work of great skill, a vast expenditure and a doubtful result

and we have the facts substantially as they existed when complainant sought the intervention of a court of equity.

Of this condition of facts, this court, in its opinion, said:

"This was a continuing nuisance and trespass existing at the time of the commencement of the action, and without respect to the lands or the freehold estate continuing down to the entry of the decree for which an injunction was the only plain, adequate and complete remedy."

This conclusion of the court was essential to the affirmance of the judgment, and with it, we respectfully take issue. The acts complained of are in no sense a trespass.

Hicks v. Drew, 117 Cal. 305.

The defendant was neither expressly nor impliedly, doing any act tending to maintain or continue this nuisance. The act had been committed, the injury naturally followed from such act and was continuing despite the will and the effort of defendant to abate it. While the nuisance was continuing it is not true that the defendant was continuing it. The defendant had learned its lesson. There was no allegation or proof tending to show that the defendant having learned its lesson would ever undertake to repeat the offense. It had carelessly and negligently taken its chances that extraordinary floods would not come down the river. It had taken these chances safely on several occasions before. This, of course, did not relieve it from the consequences of its negligence, but it is not even suggested that defendant

was threatening or intending to take any further chances or to perform any other negligent act. It was doing its best to repair the results of its past negligence. It was meditating no wrong. When able to regulate and control the waters flowing through its headgates and canals, it had never so regulated them as to permit any overflow upon the lands of the complainant. It is not so alleged or claimed. The negligence of the defendant consisted entirely of one certain negligent act, from which all of the injury followed. For the consequences of such act it was responsible, of course, in an action at law for damages, but at the time of the commencement of this suit, neither its conduct nor its intentions or expressions of intention were such as to warrant an appeal by the complainant to the chancellor to force an unconscientious defendant to do equity.

Before examining into the law and by way of prefatory illustration, suppose that some careless person to serve a purpose of his own, had removed part of a river embankment or levee. The water working naturally, finds its way through and enlarges such hole in the embankment, and eventually destroys it and inundates complainant's property. The person tries in vain to arrest the progress of destruction which his negligence had brought about. Of course such person is responsible in damages; but will it be, can it be seriously argued that such facts will justify the intervention of a court of equity? That a court of equity will compel him to rebuild the embankment or as in our case

to sally forth into a neighboring republic and under the penalty of contempt, there undertake a colossal work such as the evidence shows to have been the closing of this break in the Colorado river?

If one had carelessly failed to extinguish the fire which he had built to cook his breakfast in North Dakota and an ensuing conflagration raging in such state had assumed such dimensions that it threatened to cross the line and consume properties in South Dakota, will it be contended that a court of equity at the instance of a resident in South Dakota whose property was thus threatened, assuming that the progress of the fire could be arrested by energy and skill and large expenditure, would, if the party who had started the fire could be served with summons within its jurisdiction, compel him by mandatory injunction to return to North Dakota and undertake the arrest of the flames?

With these preliminary suggestions let us now consider the legal issues involved in the proposition above stated upon which this petition is based.

ARGUMENT.

It will be conceded for the purposes of this petition that an action for damages to property within the jurisdiction of a court occasioned by a nuisance maintained in another jurisdiction may be brought at the election of the plaintiff in either jurisdiction.

We respectfully submit, however, that no authority has been found unless it be perhaps the case of Miller and Lux v. Rickey, which confers upon plaintiff such an election in a court of equity, where he seeks not

damages, but by injunctive process to abate the nuisance, and that the sound rule is that a court of equity is without power to compel a defendant to do anything which is not capable of being physically done within the territorial jurisdiction of the court.

In combating this principle, this court in its opinion asks:

"Why may not a court restrain a party over whom it has jurisdiction from injuring property within its jurisdiction? How does it affect the question of jurisdiction or venue to say that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court? May this not often happen and would it not happen oftener if it were determined that such an excuse was sufficient to defeat the jurisdiction of the court?"

These three questions may be answered separately.

The first. "Why may not a court restrain a party over whom it has jurisdiction from injurying property within its jurisdiction," might be answered in the affirmative, provided always that the restraining decree is a prohibition and is not an order requiring the defendant to do some positive act upon property beyond the jurisdiction.

The second may be answered by the following language in the opinion of the Supreme Court in the Northern Indiana R. R. case:

"Wherever the jurisdiction of the person will enable the Circuit Court to give effect to its judgment or decree, jurisdiction may be exercised. But wherever the subject

matter in controversy is local and lies beyond the limit of the district, no jurisdiction attaches to the Circuit Court sitting within it."

The "subject matter in controversy" here is not the lands of complainant in California. There is no contention or issue with respect to them. The matter in controversy was the intakes, whether the defendant should be compelled to close them, whether they were negligently cut and whether they were the proximate cause of the inundation.

The answer to the third inquiry is that where the litigation involves rights of the plaintiff to property within the jurisdiction of the court, which rights the defendant invades by his acts in another jurisdiction, the court will assume jurisdiction to adjudicate the rights of the plaintiff as to his property situated within the jurisdiction of the court, as was the case in Miller & Lux v. Rickey; but it will not undertake to go further and by injunction compel the defendant to perform any act upon the soil in another jurisdiction, even though the performance of such act be essential to the plaintiff's enjoyment of his property.

To repeat such inquiry, "How does it affect the question of jurisdiction of venue to say that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court."

The further answer is that the court is without power. The defendant in order to obey must be permitted to escape; the court cannot hold him and compel obedience. When he escapes he may decline to obey and the court

will be without redress or power to compel his further obedience.

The principle is thus stated in the case of Munson v. Tryon, 6 Phila. 395:

"Jurisdiction is entertained in equity over extra territorial torts when the court has full power to execute its decree where the appropriate decree operates on the future conduct of the defendant and not directly upon the property threatened to be injured. When a nuisance has been set up and abatement decreed, in order to carry the decree into effect, a writ of assistance or other similar process may be necessary. Such a writ cannot be sent into a foreign jurisdiction, and therefore, in such a case, because a court of equity cannot complete its work, it will not commence."

The limitations, therefore, of a court of equity having jurisdiction over the person are fundamental, and it will not, because it cannot enforce an act which is incapable of being physically performed within its territorial jurisdiction.

In its opinion in this case the court cites many authorities to the effect that an action for damages may be brought in the district where the property damaged is situated, even though the nuisance causing the damage is maintained in another jurisdiction. But, saving always the case of Miller and Lux v. Rickey to which particular reference will presently be made, it cites no case where a court of equity assumed jurisdiction in derogation of the principle as thus laid down.

The cases of Massie v. Watts and Phelps v. McDonald, as well as the Lord Baltimore case cited in the opin-

ion do not appear to us to militate against this principle. They were all cases affecting, it is true, property in another jurisdiction, but where the act decreed to be done, to-wit: the execution of a conveyance, could be done within the jurisdiction of the court.

If a court of equity in California has jurisdiction over the person of a party who has real estate in the city of London which it is his duty to convey to the party in California, the court will compel defendant to execute such conveyance, even though the effect of such decree is to settle title to property in London.

The reason why the court assumes such jurisdiction is that as a matter of fact it has the power to compel the defendant to execute the conveyance. The act of conveyance is capable of being physically done within the territorial jurisdiction of the court and a court of equity will punish and imprison the defendant until he executes the conveyance in such form and manner as to effect a valid transfer of the property in London. Such decree would not of itself, operate as a conveyance in London. A deed in pursuance of it, or in other words, the active obedience of the defendant to the decree, is essential to its efficacy. If the law of England were that no conveyances of property in London would be valid unless the grantor in person stood upon the property and made the grant, and the fact that such was the law should be established to the satisfaction of the California court, then the California court would not make any such futile decree.

Texas & Pac. R. R. Co. v. Gay, 25 L. R. A. at top page 50.

Miller & Lux v. Rickey.

The fundamental distinction between this important case and our case is that the subject matter of the controversy between Miller & Lux and Rickey was the ownership of certain waters in the Walker river; while in the case at bar no question of conflicting rights is involved. The appellant has at no time claimed the right to divert water, if the effect of so doing would work injury to the land of the complainant. Its defense upon the merits was not that it had the right to divert the water, but that as a matter of fact the conceded negligent act of diversion was in the first place not its act, but the act of a Mexican corporation, and in the second place was not the proximate cause of the injury to complainant.

In the one case the action is in effect an action to quiet title, while in our case it is an action to abate a nuisance.

This was a suit brought to enjoin defendants from the alleged wrongful diversion of waters flowing down the stream of both forks of the Walker river, having their source in California and flowing down into and through the state of Nevada where the lands of the complainant were situated.

After alleging its rights and privileges in the premises and the alleged wrongful acts of the defendants, the complainant averred "That all of the said acts, doings and claims of the said defendants are contrary to equity and good conscience."

The prayer was that the "defendants be forever enjoined and restrained from diverting any water from

the said river above the points where the said complainant so diverts the same in such a manner or to such an extent as to deprive complainant of any of the waters aforesaid."

The plea of the defendant was that the only waters of the Walker river which he had diverted was under a claim of right to divert by reason of his ownership of certain lands within the state of California.

The defendants' alleged acts of diversion were in the state of California, and the suit was brought in the Circuit Court for the district of Nevada.

It appears, therefore, that the plaintiff in such suit claiming to own water appurtenant to land in Nevada, sought to quiet his title to such land and water by a decree of the court having jurisdiction in Nevada.

The defendant Rickey claimed title to the water as appurtenant to his lands in California, and in pursuance of such claim constructed a dam in California and diverted the water.

Judge Hawley rendered judgment over ruling defendant's demurrer to the jurisdiction of the court, 127 Federal.

The defendant, Rickey, thereupon answered, and the issues so joined have not as yet been tried.

In the meantime Rickey organized a corporation, the Rickey Land & Cattle Company, and conveyed to that corporation the water rights and the lands in California to which they were appurtenant, the ownership to which he had set up as a defense in his answer to the suit brought by Miller & Lux in Nevada.

Thereafter the Rickey Land & Cattle Company com-

menced two certain suits in the Superior Court of Mono county, Calif., wherein it alleged its ownership of such lands in California and its right to certain waters of the Walker river, and that the defendants in that suit, including Miller & Lux, the complainant in the Nevada suit were claiming the right to divert the water of the river, and alleged that the defendant, Miller and Lux, had no such right.

The prayer of the complaint in that case was that the title of the Rickey Land & Cattle Company to the waters of the river should be quieted as against Miller & Lux and the other defendants.

Miller & Lux thereafter contended in the Nevada suit that the issues in the Mono county suits brought by the Rickey Land & Cattle Company were the same as the issues in such Nevada suit originally brought by Miller & Lux, and asked for an injunction restraining the Rickey Land & Cattle Company from prosecuting such suits brought in Mono county.

After a hearing the injunction asked for was granted by Judge Hawley, 146 Federal. From the order granting the same the Rickey Land & Cattle Company appealed to the Circuit Court of Appeals which court affirmed the said order, 152 Federal. Thereafter the petition of the Rickey Land & Cattle Company to the United States Supreme Court for a writ of *certiorari* was made and granted, and the appeal is now pending in such court, and as we are advised, will be reached for argument in the month of November.

It will be observed that at no time has it been held that the Nevada court had power to grant an injunction

restraining defendant from diverting waters in California. The decision of Judge Hawley both in overruling the demurrer and in restraining the prosecution of the suits brought in Mono county were in effect that the Nevada court had jurisdiction to quiet title to complainant's land and water in Nevada, albeit that the effect of such decision was to adjudicate that defendant had no right to the same waters appurtenant to his lands in California.

It is possible that it might be inferred from the language employed by Judge Hawley quoted in the opinion of this court that the Nevada court having power to quiet title to complainant's land in Nevada, would also have power to prohibit the defendant from doing any act in Nevada or elsewhere, which would be an invasion of complainant's title thus quieted. The decision, however, overruling the demurrer does not necessarily carry any such import, for the demurrer was properly overruled if the complainant was entitled merely to have his title quieted.

In his opinion ordering the injunction he says at page 583:

"Under the facts of this case the question arises whether or not this court has power and authority to issue the injunction against the Rickey Land & Cattle Co. that is prayed for (meaning the injunction to restrain the California suits); in other words, has this court any jurisdiction in the premises?"

And later at page 588:

"The suits in this court will quiet and settle the title

or rights of the respective parties to the flowing waters of the Walker river."

Certainly the decision of Judge Hawley cannot be construed to mean that the Nevada court had the power to compel the defendant to do any positive act beyond the territorial limits of Nevada.

As has been suggested before, there is an obvious distinction in this matter of jurisdiction between the power to issue a restraining order and to decree a mandatory injunction requiring the defendant to do some positive act beyond the jurisdiction of the court. Judge Hawley says, 127 Federal, at p. 576.

"The direct purpose of all judicial acts is relief to a litigant which cannot be given by judgment or decree alone, but must be given if at all through the enforcement of the one or the other by appropriate process, and it has often been said that the highest test of the jurisdiction of a court in a given case is found in the answer to an inquiry whether it has lawful power thus to enforce its decree."

And as has been heretofore pointed out at the very outset of his opinion he wrote:

"It will, of course, be conceded at the outset that this court has no jurisdiction over lands and real estate situated without this district. *It cannot abate nuisances outside of the district.* It cannot reach property *in rem* wholly situated in other states. It cannot by any decree which it may make in this suit directly reach the dams, reservoirs or ditches belonging to the defendant located entirely within the state of California."

These two excerpts from Judge Hawley's opinion indicate that while he may have come to the conclusion that a court of equity had the power to issue a restraining order against any person over whom it had jurisdiction, it had no power to compel such person to do any act, the physical performance of which was incapable of being done within the jurisdiction of the court.

This Honorable Court in its opinion reported in the 152nd Federal, bases its affirmance and the jurisdiction of the court entirely as has been said upon its conclu sion that the action was in effect one to quiet title to property in the state of Nevada.

Even as Judge Hawley at the commencement of his opinion asked: "What is the nature and character of this suit?" so did this court at the outset of its opinion declare: "It is important that we first ascertain the nature of the subject matter of the cause."

It next elaborately discusses the nature of property in water, and concludes, "Could there be a plainer case of an attempt to quiet title to the appropriation itself? * * * It (the water) is appurtenant to the realty in connection with which the use is applied. It savors of and is a part of the realty itself. The suit, therefore, in its purpose and effect, is one to quiet title to realty."

It reviews all of the authorities to the effect that where the action was for damages, it might be brought either in the jurisdiction where the nuisance was maintained or where the lands which were injured were situated, and concludes with what we deemed a positive declaration of the principle as contended for by us:

"In the case of nuisance, however, where it is sought

to abate the nuisance by injunctive process, it is requisite that the suit be instituted in the jurisdiction where the nuisance is maintained, because it is said the remedy is *quasi in rem,* and must act upon the thing itself which is causing the damage. This was held in the case of Stillman v. White Rock Manufacturing Co., Fed. Cas. No. 13,446 (23 Fed. Cas. 83)." 152 Federal at p. 16.

This principle would seem, also, to be the same as that announced by the Supreme Court of Iowa, in the case of Gilbert v. Moline Water, Power & M. Co., 19 Iowa 319.

In its opinion in this case, this court does not refer to its own opinion in the Rickey case, nor to the above quoted portions of Judge Hawley's opinions, but says:

"Judge Hawley in an elaborate opinion considered the question of jurisdiction as presented by these objections and reviewed the authorities upon the subject, meeting and answering the objections raised and urged by the defendants in this case that the court could not send its process to execute its decree into foreign territory. The court says on page 580:

" 'That this court has jurisdiction over the person of the defendant is unquestioned. It can reach him by injunction, and punish him for contempt if he violates it. This doctrine had its foundation in the equity courts of England and at an early day.' "

Immediately preceding the part of Judge Hawley's opinion thus quoted, Judge Hawley wrote:

"The jurisdiction of courts of equity over the classes of cases affecting property without its local jurisdiction exists only when the relief sought is such that it may be

given by the acts of the person over whom the court exercises jurisdiction."

Our conclusion would be that if the court had any jurisdiction in the case of Miller & Lux v. Rickey, its powers were limited to granting a decree quieting the title of complainant to the waters appurtenant to its lands in Nevada; that the court would have no power to issue an injunction restraining defendant from maintaining a dam in California, *and certainly would have no power to issue a decree compelling him to pull down a dam in California;* that the court had no power to abate a nuisance maintained in California, but did have the power to determine the respective claims of the parties to ownership of the water—to decide whether the same was rightfully appurtenant to the lands in Nevada even though an adjudication to such effect would as a corollary establish that it was not rightfully appurtenant to the lands in California.

It was the conflicting claims to property in the water which gave the court jurisdiction, and its jurisdiction to render any decree whatever was dependent entirely upon the defendant's assertion of a right to the water which was inconsistent with plaintiff's alleged title to it.

The cases of Deseret Irr. Co. v. McIntyre, 16 Utah 398, and Willey v. Decker (Wyo.), 73 Pacific 210, cited by Judge Hawley, both involved conflicting claims to the ownership of water, and the court based its assumption of jurisdiction upon the fact that such suits were in effect suits to quiet title to realty within the court's jurisdiction.

If the defendant had interposed an answer admitting

the fact of the diversion, and denying that he made such diversion under claim of title, and disclaiming any right to the water, the court would have been without jurisdiction to enter a decree against him, even though it found as a fact that defendant was tortiously diverting water to which complainant was entitled. The defendant, Rickey, however, did allege ownership. Accordingly the court assumed jurisdiction to quiet plaintiff's title, but not to issue an injunction which would be effective upon the lands in California.

If after a decree quieting plaintiff's title, defendant should persist in diverting the water in California, the remedy of the complainant would be to go to California and apply for an injunction to the court having jurisdiction over the place of diversion. In such suit the decree of the Nevada court quieting complainant's title, would be a bar against any assertion by defendant of any right to divert the water, and, therefore, upon proof of the fact of the diversion, either a prohibitory or a mandatory injunction as a matter of course would issue from the California court.

Assuming despite the forceful argument of counsel for Rickey that the Nevada court in that case had jurisdiction to quiet the title of Miller & Lux as against Rickey, we believe that the character of jurisdiction and the nature of the decree, while in effect the same as an injunction restraining Rickey from diverting waters in California, would, in form, be necessarily analogous to a decree in an action to compel a conveyance of property in another jurisdiction. In other words, the court in Nevada would decree that Miller & Lux were entitled

to the water, and in order to give complete efficacy to its decree could instruct Rickey to execute to Miller & Lux a conveyance or quit claim to the water whose ownership Rickey was asserting in California. This conveyance Miller & Lux could use in California and thus acquire the entire benefit of the decree of the Nevada court. We urge, however, that in order to gain such entire benefit of the decree of the Nevada court, it is essential that Miller & Lux should have something further than the mere decree of the Nevada court. They must go into California either with the decree as the basis for the issuance of an injunction by the California courts, or with a conveyance of Rickey's right; for the decree of the Nevada court cannot be made to extend to the *res* in California.

In its last analysis a court of equity can only act upon the person and within its own limits compel such person to comply with its order, and unless such compliance within the jurisdiction of the court can give the complainant the remedy he seeks the court of equity is necessarily powerless.

Conclusion.

If the United States Supreme Court should reverse the judgment in the Rickey case, it is believed that such reversal would necessarily involve the enunciation of a principle of law which would be inconsistent with the legality of the decree in this case.

The reluctance of the United States Supreme Court to grant a petition of certiorari is well known. It would seem therefore that the denial of this petition by this

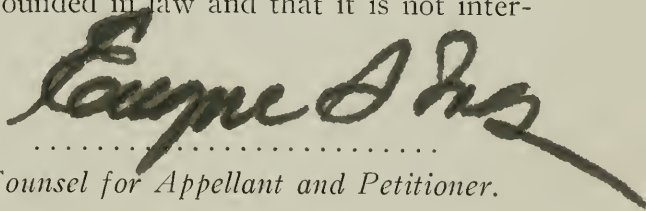
court would work a manifest injustice to this appellant if perchance the United States Supreme Court in its opinion in the Rickey case should establish the principle as now contended for by appellant.

It is furthermore believed that the perpetual injunction now affirmed may in the course of the vast irrigation enterprise conducted by the appellant give rise even to international questions with respect to the diversion of the waters of the Colorado river in Mexico. Appellant, therefore, most respectfully urges that this Honorable Court either grant the petition for a rehearing and let the further argument await the enlightenment which the decision of the United States Supreme Court in the Rickey case must necessarily give, or else grant this petition and thereupon certify to the United States Supreme Court the question of the power of the Circuit Court by mandatory injunction to compel the closing of a break of the Colorado river in the Republic of Mexico, and the further question of the jurisdiction of a court of equity to decree a mandatory injunction under the facts disclosed by the record in this case.

Respectfully submitted,

EUGENE S. IVES,
Counsel for Appellant.

I hereby certify that in my opinion the foregoing petition is well founded in law and that it is not interposed for delay.



Counsel for Appellant and Petitioner.